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No. 95-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF

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This Supplemental Brief responds to the Brief for the United States as Amicus Curiae.

1. The "Public Disclosure" Issue

A. The United States asserts that this Court should not review the acknowledged circuit split created by the decision below because the Ninth Circuit could have decided this case (but did not) on narrow factual grounds "reconcilable" with the Second Circuit's holding in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). *See* U.S. Br. at 11-13. That assertion is untenable as a matter of law and fact.

The Ninth Circuit held below that "disclosure to company employees does not constitute public disclosure." Pet. App. at 11a. The court did not remotely purport to limit that holding to the particular facts of this case—to the contrary, the court went out of its way to announce a *per se* legal rule that disclosure to "innocent employees" cannot qualify as "public disclosure" *as a matter of law*. *Id.* at 9a-11a. According to the Ninth Circuit, it is "unrealistic" to treat such employees as members of the general public. *Id.* at 9a. "Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Id.*

The Ninth Circuit acknowledged that the Second Circuit in *Doe* had adopted precisely the opposite *per se* rule—that disclosure to a contractor's "innocent employees" *does* qualify as "public disclosure" as a matter of law. *See Doe*, 960 F.2d at 323-24. The Ninth Circuit expressly and emphatically rejected that holding. *See* Pet. App. at 11a ("[W]e reject the *Doe* court's definition of 'public disclosure,' which forecloses many insiders from bringing *qui tam* actions."); *id.* at 9a ("We decline to adopt the rule of *Doe* for application in this circuit.").

The United States now suggests that both the Second and Ninth Circuits erred in approaching the definition of "public

disclosure" as a *legal* question. According to the United States, "[t]he question whether information revealed to a corporate defendant's employees is the subject of a 'public disclosure' cannot appropriately be resolved on the basis of a per se rule." U.S. Br. at 11. Under this view, the application of the FCA's jurisdictional bar involves an essentially *factual* inquiry that "depends upon the circumstances under which the information is revealed," *id.*, and must be resolved on a case-by-case basis.

Applying its fact-based definition of "public disclosure"—which neither the Ninth nor the Second Circuit adopted—the United States concludes that this case and *Doe* are "reconcilable." U.S. Br. at 11. The asserted "public disclosure" here, the United States suggests, was not as "public" as the "public disclosure" in *Doe*. *Id.* at 12-13. Thus, the United States declares, both this case and *Doe* were correctly decided (albeit for the wrong reasons) and this Court should not review the conflicting *per se* rules of law announced by the Ninth and Second Circuits. *Id.* at 13.

The United States' position is preposterous. An acknowledged circuit split is no less real (and no less worthy of this Court's review) because one or both of the circuits might have rested its holding on different and narrower grounds. Regardless of whether the Ninth Circuit could reasonably have distinguished *Doe* on narrow factual grounds, the fact remains that the Ninth Circuit *did not do so*. The Ninth and Second Circuits have adopted contradictory *legal* definitions of "public disclosure." The United States may believe that both those definitions are wrong, but it cannot deny that the decision below is "in conflict with the decision of another United States court of appeals" on an important question of federal law. Sup. Ct. R. 10(a). Indeed, even respondent Schumer did not attempt to deny the circuit conflict. *See* Opp. Br. at 1, 8-9. The United States' efforts to advance yet *another* definition of "public disclosure" only highlight the need for this Court to review this important question.

In any event, there is no tenable basis for distinguishing *Doe* on factual grounds. It is true that *Doe* involved both a civil and a criminal investigation of a government contractor whereas this case involves only a civil audit and investigation. But the *Doe* Court expressly rested its "public disclosure" holding on the civil, *not* the criminal investigation. *See* 960 F.2d at 323.

Accordingly, it is disingenuous (to say the least) for the United States now to suggest that the "public disclosure" holding in *Doe* depended on the *criminal* investigation. *See* U.S. Br. at 10-11, 13. Because neither the court below nor the *Doe* court rested its definition of "public disclosure" on narrow factual grounds, there is simply no way to compare the relative dissemination of the information in the two cases. There is certainly no basis for the United States' extraordinary assertion that the government audits in this case received only "limited dissemination" among petitioner's employees, or that the "innocent employees" in *Doe* "acquired information from the government . . . not in the course or scope of their private employment, but essentially as members of the public who might have had knowledge of evidence relevant to the government's investigation." *Id.* at 13. The United States' attempt to rewrite the holdings in this case and *Doe* is based wholly on unvarnished speculation.[1]

Indeed, the United States' current assertion that the definition of "public disclosure" is not susceptible to a *per se*

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[1] If anything, the administrative investigation in this case appears to have been more broadly disclosed than the administrative investigation in *Doe*. Here, after all, the allegations of wrongdoing were presented not only to *petitioner*'s "innocent employees" but also to *Northrop*'s. Northrop employees were not only *aware* of the Government investigation of petitioner's accounting practices; they *launched* that investigation. *See* White Paper on "Radar Commonality" dated Feb. 20, 1986, attached to Declaration of Laurie L. Bilbruck, dated 10/12/90, filed as Attachment D to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed 10/15/90; Deposition of Robert C. Davis, at 43 (Ex. 86 to Defendant Hughes Aircraft Company's Exhibits in Support of Motion for Summary Judgment (filed 1/27/92)).

rule is a marked departure from the United States' longstanding position to the contrary. The United States has most often addressed this issue in the context of *qui tam* actions brought by government employees. In such cases, the United States has consistently argued that—*regardless of the facts*—the "public disclosure" provision *as a matter of law* prohibits both government employees and private parties from bringing "parasitic" *qui tam* actions based on information obtained from the Government. "A suit by a private person who relies upon information disclosed to him by a government employee in the course of an 'audit, or investigation,' [is] barred, *whether or not the information has been disclosed to the public at large*. The fact that the information derives from the government and has been disclosed pursuant to that 'audit, or investigation,' as those terms are broadly defined, is sufficient to bar a complaint based on that information." Brief for the United States at 14, *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1991) (No. 90-1246) (excerpted *infra*, Appendix A, at 9a) (emphasis added). *See also* Brief for the United States at 16, *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991) (No. 89-3973) (excerpted *infra*, Appendix B, at 24a) ("The 1986 version of the jurisdictional bar . . . continues the existing bar on parasitical suits.").

In particular, the United States now endorses the very argument that it has long opposed: that no "public disclosure" can occur where "innocent employees" (either of the government or a contractor) receive confidential information in the course of their employment. *See* U.S. Br. at 12. This issue arises frequently in *qui tam* suits filed by government employees. In opposing such suits, the United States has invariably argued that the confidential information obtained from the government is "publicly disclosed" as a matter of law. "The legislative history as well as the language of section 3730(d)(1) demonstrate . . . that Congress referred to 'public' disclosures in its broadest sense and was concerned principally with the use of government information." Brief for the United States at 21, *United States ex rel. Williams*, *infra* at 28a

(footnotes omitted). Indeed, the United States has previously characterized the argument that no "public disclosure" can result from the dissemination of confidential materials as "irrational" and without "foundation in the statute, its history, or the extensive 1986 legislative materials." *See id.* at 8, 18, *infra* at 18a, 25a.

The United States' attempt to justify the Ninth Circuit's outlandish decision under a fact-based rationale that the Ninth Circuit did not adopt is not only wrongheaded but also unworkable. The United States' fact-based approach to "public disclosure" would require the district court in every case to conduct factual hearings on the threshold question of jurisdiction. The district court's unenviable task in such a hearing would be to resolve the intractable question of just how "public" a particular "disclosure" had been. Disputed issues of material fact about the nature and extent of a particular disclosure would presumably be submitted to a jury. It is unlikely, to say the least, that Congress intended the FCA's jurisdictional bar to operate in this cumbersome manner. A jurisdictional bar is hardly effective if it entails extensive collateral litigation. Thus, it is not surprising that the courts of appeals have rejected the fact-based approach now advanced by the Government in favor of *per se* rules of law.

In the final analysis, the effect of denying the petition (as the United States recommends) would be to leave in place not only an acknowledged circuit split but also the Ninth Circuit's *per se* rule that the United States conspicuously declines to defend. As none other than the United States has recently stressed, the Ninth Circuit is home to a disproportionate number of *qui tam* cases. *See* Petition for Certiorari at 21, *United States v. Northrop Corp.*, No. 96-123 (filed July 22, 1996). The decision below is binding precedent: the employees of government contractors are now free in the Ninth Circuit to file "parasitic" *qui tam* actions based wholly on information obtained from the Government. The FCA neither requires nor tolerates that absurd result.

B. The United States next contends that petitioner's alternative argument—that a "public disclosure" occurs when government documents are made available under FOIA—is unworthy of review because the United States does not agree with it. *See* U.S. Br. at 14. The fact remains, however, that the circuits are in disarray on the question whether a "public disclosure" occurs at the point when government information is made *available* to the public, or at the point when a member of the public *actually obtains* that information. *See* Pet. at 16-18. Indeed, the Tenth Circuit recently highlighted this disarray:

> Our sister circuits are divided on the question whether theoretical or potential accessibility—as opposed to actual disclosure—of allegations or transactions is sufficient to bar a *qui tam* suit that is based upon such information. *Compare United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3d Cir. 1991) (information exchanged between private parties through discovery but not filed with the court is 'potentially accessible to the public' and thus is publicly disclosed) *with United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519-20 (9th Cir. 1995) (holding that 'public disclosure' means actual disclosure rather than potential availability), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 15, 1996) (No. 95-1340) *and United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 652-53 (D.C. Cir. 1994) (expressing doubt that documents revealed during discovery but not filed in court were publicly disclosed, and rejecting view that 'public disclosure' includes information that 'is only theoretically available upon the public's request.').

United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1519 (10th Cir. 1996). This Court can and should resolve this additional circuit conflict in the course of addressing the meaning of "public disclosure" in this case.

2. The Retroactivity Issue

The United States also urges this Court to deny review on the retroactivity issue. The United States concedes that the retroactivity holding below conflicts with the Sixth Circuit's decision in *United States ex rel. Eagleye v. TRW, Inc.*, 4 F.3d 417, 422-23 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994), but insists that *TRW* is no longer good law in light of this Court's subsequent decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). As petitioner has noted, however, *TRW* is entirely consistent with *Landgraf*—a point underscored by this Court's denial of certiorari in *TRW* shortly before *Landgraf* was announced. *See* Pet. at 10 n.2, Pet. Reply at 2. It would make little sense for this Court to review the statutory issues described above without considering whether the 1986 FCA amendments apply here in the first place. Thus, the retroactivity issue merits review both in its own right and in connection with the other questions presented in this case.[2]

3. The "Public Fisc" Issue

Perhaps the most astonishing aspect of this case is that it does not involve any false "claim" against the United States at all. Respondent challenged certain of petitioner's accounting practices; the Government has conclusively determined that those practices actually *saved* it money. Thus, the basic predicate for an FCA action is missing.

The United States, however, endorses the Ninth Circuit's conclusion that no injury to the public fisc is necessary to establish an FCA cause of action. *See* U.S. Br. at 14-16. That interpretation vastly expands the scope of the FCA from false *claims* against the Government to false *statements* to the Government. The latter, of course, are already proscribed by 18 U.S.C. § 1001. As a matter of language and logic, it is

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[2] The retroactivity issue is also presented in another pending petition, *Northrop Grumman Corp. v. United States ex rel. Hyatt*, No. 96-17 (filed July 2, 1996).

simply impossible to characterize the alleged use of an improper accounting method, without more, as a "claim," much less a "false claim" actionable under the FCA.

The United States also errs by asserting that the lower courts are in harmony on this point. To the contrary, a recent decision only underscores the prevailing disarray. *See United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507 (M.D. Tenn. 1996). The district court there originally granted summary judgment in favor of an FCA defendant on the ground that the plaintiff had failed to allege any injury to the public fisc. *See* 1995 WL 626514 at *6 (relying on *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994)). The plaintiff then moved for reconsideration, relying on several cases (including the decision below) holding that injury to the public fisc is not an essential element of an FCA cause of action. The district court noted the clear split in authority on this question, *see* 914 F. Supp. at 1508-09, but deemed its original holding inconsistent with this Court's decision in *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956). *See* 914 F. Supp. at 1509 ("While there is clearly some disagreement among the courts regarding this issue, this Court cannot ignore the decision of the Supreme Court in *Rex Trailer*.").

As petitioner has noted, however, *Rex Trailer* stands only for the unremarkable proposition that an FCA plaintiff need not produce specific evidence of *damages*, not for the startling proposition that the plaintiff need not establish *any injury at all*. *See* Pet. at 21-22. Accordingly, the "public fisc" issue merits review both in its own right and in connection with the other questions here presented.

D. The Constitutional Issues

Finally, the United States asserts that this Court should decline to review the underlying constitutional questions raised in this case. According to the United States, such review is unwarranted because (1) no circuit split exists on the constitutionality of the FCA's *qui tam* provisions, *see* U.S. Br.

at 16, and (2) the decision below is correct on the merits, *see id.* at 17-20. Both points are meritless.

As an initial matter, the Government is in no position to argue that this Court should review only those issues on which there is a circuit split, because the Government itself has asked this Court to review a Ninth Circuit interpretation of the FCA on which there is concededly no split. *See* Petition for Certiorari at 21-22, *United States v. Northrop Corp.*, No. 96-123 (filed July 22, 1996). Surely, if a particular application of the FCA's *qui tam* provisions warrants this Court's review in the absence of a split, the underlying constitutionality of those provisions is a matter at least as worthy of review.[3]

In any event, the constitutional issues here merit review not only in their own right, but also in connection with the statutory issues presented, on which the circuits manifestly *are* in conflict. These statutory issues cannot and should not be decided in a constitutional vacuum.

On the merits, the United States remarkably fails to address petitioner's principal constitutional argument: that Congress cannot delegate to private parties the core Executive power of executing the laws of the United States on behalf and in the name of the United States. *See* Pet. at 23-24. Rather, the United States breezily asserts that the FCA's *qui tam* provisions raise no separation-of-powers problems. *See* U.S. Br. at 20. Although it is not unprecedented for the Executive Branch to argue against Executive Power, *see Metropolitan Washington Airports Auth. v. Citizens for the Abatement of*

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[3] The United States' petition in *Northrop* conspicuously fails to raise any constitutional concerns with respect to the FCA's *qui tam* provisions, even though the Ninth Circuit there held that the Attorney General lacks the power under the FCA to block the voluntary dismissal of a *qui tam* action. *See* Petition for Certiorari at 2a-5a, *United States v. Northrop Corp.*, No. 96-123 (filed July 22, 1996). That holding, of course, cannot be squared with the fiction that the Attorney General maintains any meaningful "control" over *qui tam* relators, and thus underscores the constitutional infirmity of the FCA's *qui tam* provisions.

Aircraft Noise, Inc., 501 U.S. 252, 263-64 (1991), it is up to *this Court* to determine the relative powers of the Branches, *see id.* at 272.

The United States next asserts that the FCA's *qui tam* provisions survive scrutiny under the Appointments Clause on the theory that a *qui tam* relator is "analog[ous] to a plaintiff who invokes a private right of action under a federal statute." U.S. Br. at 19. Although in both situations it can be said that the "private lawsuit assists in the effectuation of federal policy," *id.* at 20, the distinction is obvious: run-of-the-mill private plaintiffs assert rights of action under federal statutes *in their own name* for an injury that *they* have allegedly suffered, whereas *qui tam* relators assert a right of action *in the name of the United States* for an injury that the *United States* has allegedly suffered. The latter function is the core Executive Power to execute the laws of the United States on behalf and in the name of the United States, and hence cannot be exercised by persons who have not been duly appointed pursuant to the Constitution.

Finally, the United States asserts that the FCA's *qui tam* provisions are consistent with the standing requirements of Article III. *See* U.S. Br. at 17-18 & n.11. The United States, however, makes no more than a token effort to reconcile its arguments with modern standing law. It is well established that Congress is constrained by the constitutional "case or controversy" requirement, and cannot confer standing at will. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-78 (1992). This constitutional limitation would be meaningless if Congress were free to create private standing where it would not otherwise exist by simply purporting to "assign" rights belonging to the United States or third parties, or by creating a statutory bounty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 90-1246

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA *ex rel.* ROLAND A. LEBLANC,

Plaintiff-Appellant,

v.

RAYTHEON COMPANY, INC.,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES OF AMERICA

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* * *

SUMMARY OF ARGUMENT

The district court correctly ruled that Mr. LeBlanc's suit, which is based entirely upon information obtained in the course of his government employment, is barred under the plain language of the 1986 amendments to the False Claims Act, and that to allow such a suit would directly contravene Congress' expressed intent to assist the Attorney General of his antifraud efforts.

In his fight against fraud, the Attorney General must rely on large numbers of investigators, auditors, attorneys, and other government personnel. If these employees could file qui tam complaints for their own private profit based upon information that comes in to the government, they could well spend their time gathering information to be used for their own complaints. The skewed incentives created by such a rule would wreak havoc on the government's antifraud program as well as on personnel management within the government and would undermine the Attorney General's enforcement priorities. Such suits would not supplement government enforcement—which was Congress' express purpose in liberalizing the qui tam provisions of the False Claims Act in 1986[2]—but would instead supplant it. The district court decision rejecting such an interpretation of the Act should be affirmed.

ARGUMENT

The False Claims Act, 31 U.S.C. § 3730(e)(4), divests the district courts of subject matter jurisdiction over qui tam suits based solely upon information obtained by the federal government. There is no dispute that Mr. LeBlanc's complaint was based upon such information; the complaint was therefore properly dismissed.

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[2] *See* S. Rep. No. 345, 99th Cong., 2d Sess. at 7-8, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5272-73 (purpose of qui tam statute is to supplement overstretched government enforcement resources).

I. THE BAR ON FALSE CLAIMS ACT SUITS BY GOVERNMENT EMPLOYEES BASED UPON GOVERNMENT INFORMATION IN EFFECT SINCE 1943 HAS NEVER BEEN REPEALED

To our knowledge, no government employee has ever successfully prosecuted a case under the False Claims Act. The Act was enacted in 1863, and from that date until 1943, when the statute was amended, we are aware of no cases where courts permitted such actions to go forward.[3] In 1943, despite strong policy concerns to the contrary, the Supreme Court said in dicta that such cases were permissible under the then-existing version of the Act. Congress' reaction was swift and complete: it immediately passed amendments to the False Claims Act overruling that dicta and prohibiting parasitical False Claims Act suits by private persons based on information in the possession of the government, which includes all lawsuits based upon information obtained from the government in the course of government employment.

Congress again amended the statute in 1986, intending to change the language of the statute to overrule broad court decisions interpreting the 1943 restrictions. Case law had outlawed not only lawsuits based on information obtained by the government, but also lawsuits brought by private parties based on information about fraud that they had independently obtained, which also happened to be in the possession of the government, even if the qui tam plaintiff had given the information to the government in the first place. The 1986 amendments were designed to overrule this restrictive case law.

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[3] The argument by both plaintiff-appellant LeBlanc and by amicus curiae National Treasury Employees Union that this Court should permit government employee suits because "[s]uch suits had been allowed until enactment of the 1943 prohibition," NTEU Brief at 7, *id.* at 9, App. Brief at 10, is distinguished by a notable absence of supporting authority. Since there is no evidence of such suits at any time, the statement by amicus that Congress intended to "reinstate" such suits in 1986, NTEU Brief at 7, is equally curious.

Nothing in either the 1986 statute or its voluminous legislative history even hints that Congress intended to modify in any way, let alone eliminate, the 1943 bar upon government employee suits. The district court opinion rejecting an interpretation of the statute that would have permitted such suits is therefore correct.[4]

A. In 1943, Congress Fixed The False Claims Act To Prohibit "Parasitical" Qui Tam Suits By Government Employees, And It Has Never Repealed That Ban

In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Supreme Court held that "parasitical" qui tam suits brought by private parties under the False Claims Act based on information copied from the government could go forward. The Court in dicta also stated that "even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer [qui tam relator]" in a qui tam suit. 317 U.S. at 546.

In dissent, Justice Jackson said that to interpret the statute to mean that "law-enforcement officials could use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one." Justice Jackson went on to say, presciently, that "[i]f we were to add motives of personal

[4] Two other district courts have come to the same conclusion as the court in this case, dismissing for lack of subject matter jurisdiction suits based upon information obtained in the course of government employment. *United States ex rel. Arthur P. Williams v. NEC Corp.*, No. 89-209-Civ-Orl-18 (M.D. Fla. May 12, 1989), *appeal pending*, No. 90-3188 (11th Cir.) (suit brought by former Department of Defense attorney based on information that the attorney had obtained while performing his official duties for the Department of the Air Force was dismissed); *United States v. Stern*, No. 90-153-CIV-T-17 (M.D. Fla. April 25, 1990) (court refused to allow former employee of the Department of Health and Human Services Inspector General to continue as a qui tam plaintiff in a suit that was taken over and refiled by the Attorney General).

avarice to other prompters of official zeal the time might come when the scandals of law-enforcement would exceed the scandals of its violation." 317 U.S. at 560.

With Justice Jackson's reasoning in mind, soon after *Hess* the Department of Justice recommended remedial legislation to bar these types of "parasitical" suits based upon government information, because they would impede the Department's efforts against fraud. *See* H.R. Rep. No. 263, 78th Cong. 1st Sess. 2 (1943).[5] Many Congressmen also severely criticized the "parasitical" suits permitted by *Hess*. Representative Hancock stated, for example:

> The temptation and the opportunity is tremendous under the present law for renegotiators, contracting officers of the various purchasing agencies of the government, and agents for collectors of internal revenue to take advantage of the information they discover in the course of the business to enrich themselves by instigating informer's suits. That is a temptation we wish to remove.

89 Cong. Rec. 10849 (December 17, 1943).

That same year, Congress amended the False Claims Act to overrule *Hess* and to outlaw suits based on information

[5] The Department's proposal to eliminate parasitical qui tam actions in no way demonstrates, as Mr. LeBlanc contends (App. Brief at 3 n.1), any general "antipathy to qui tam actions" on the part of the Department of Justice. Nor does the fact that, not surprisingly, private plaintiffs often complain that the Department's settlement proposals are "inadequate," in any way demonstrate a "hostility" on the part of the Department to qui tam actions, *see* App. Brief at 4 n. 1. The Department's view of qui tam suits is in any event irrelevant; the question before the Court is the proper interpretation of the statute, not the Department's attitude towards the statute.

obtained from the government,[6] barring any private suit "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."[7] This bar took away subject matter jurisdiction from the courts to hear lawsuits based upon information in the possession of the government at the time the lawsuit was brought, including lawsuits brought by government employees based upon information obtained in the course of their government work—such information by definition being "in the possession of the United States, or any * * * employee thereof." As one of the floor managers of the bill explained, the amendment precluded government employees from appropriating government information for their own or their friends' use; under the amendment these individuals were not permitted to use the qui tam provisions of the False Claims Act to sue in their private capacity and reap the qui tam reward. 89 Cong. Rec. 10846 (December 17, 1943) (Statement of Representative Walter). False Claims Act suits based upon information gained in the course of government employment were thereafter barred. *See United States ex. rel. McCans v. Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956), *aff'd*, 254 F.2d 90 (D.C. Cir.), *cert. denied*, 358 U.S. 834 (1958).

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[6] *See United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984) ("Congress's immediate concern in enacting the 1943 Amendments was to do away with the 'parasitical suits' allowed by *Hess*"); *Pettis ex rel. United States v. Morrison-Knudsen Co., Inc.*, 577 F.2d 668, 671 (9th Cir. 1978) ("The immediate concern of Congress was to do away with these so-called 'parasitical suits.'").

[7] This provision was originally codified at 31 U.S.C. § 232(C) (1976), and recodified at 31 U.S.C. § 3730(b)(4) (1982).

B. The Plain Language Of The 1986 Amendments Continues To Prohibit Suits Based Upon Information Obtained In The Course Of Government Employment

Congress has never repealed the bar upon False Claims Act suits by government employees. In 1986 Congress amended the Act, but neither the amendments themselves nor their legislative history contain anything to support the notion that Congress had decided to allow government employee suits or that it had even considered this issue. Not surprisingly, Mr. LeBlanc himself has conceded that nothing in the legislative history to the 1986 amendments "address[es] the question of whether Government employees may bring qui tam actions." App. Brief at 14; *id.* at 12. Surely, one would expect that such a major change in the statute, if intended, would be discussed somewhere in the voluminous legislative history; but that history is entirely silent. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 285 n. 13 (1974) ("If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly.")

An examination of the plain language of the 1986 amendments, far from supporting reversal of the district court decision as Mr. LeBlanc argues, demonstrates on the contrary that the district court's conclusion was correct. The amendments continue the former ban on parasitic lawsuits by outlawing False Claims Act suits based upon "public disclosures" of government information. Mr. LeBlanc's lawsuit in this case is based upon such a disclosure.

The amendments provide as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless

> the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4). Under this section, a person is generally barred from filing a qui tam suit that is "based upon the public disclosure of allegations or transactions." Nothing in the new language or the legislative history of the 1986 amendments suggests that Congress intended to remove the existing bar on government employees exploiting official information to file qui tam suits for their own profit; nor is there any reason that Congress would have done so.

Contrary to Mr. LeBlanc's argument, the types of "public disclosures" upon which a lawsuit may not be based should not be construed narrowly. As to disclosures made in litigation, for example, the statute says only that disclosures in a "hearing" cannot provide the basis for a False Claims Act suit; yet the courts have correctly interpreted the word "hearing" broadly to include any part of the litigation process in which disclosures are made, whether or not a hearing is involved. *See Houck, on behalf of United States v. Folding Carton Administration Committee*, 881 F.2d 494, 504 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1471, 1514 (1990) ("hearing" includes disclosures made in motions filed with the court); *United States ex rel. Stinson, Lyons Gerlin & Bustamante v. Prudential Ins. Co. of Am.*, __ F. Supp. ___, 1990 Westlaw 57309, slip op. at 20 (D.N.J. May 4, 1990) ("hearing" includes information contained in discovery materials).

The other types of disclosures of government information listed in the statute, such as audits and investigations, should also be interpreted broadly. The word "investigation" is not a term of art; all investigations have a starting point, which can be deemed as the date upon which information indicating a potential False Claims Act violation falls into the hands of a government employee. Mr. LeBlanc was a Quality Assurance Specialist for the Department of Defense assigned to monitor the work of the contractor he

named as a defendant; *all* of his work as an employee of the government was in some sense part of an investigation or audit within the meaning of section 3730(e)(4).

Moreover, while Mr. LeBlanc argues that the disclosures addressed in the statute are only disclosures made to the public at large, nothing in the statute so restricts the term "public disclosure." Consistently with the purpose of prohibiting parasitic lawsuits, a "public disclosure" occurs where there has been any type of disclosure of official government information to a private individual. 31 U.S.C. § 3730(e)(4)(A). Complaints based upon such disclosures are equally impermissible even if the disclosure is limited to a few individuals. For example, in *Stinson, supra*, slip op. at 20, the court concluded that the only interpretation of "public disclosure" that is consistent with congressional intent is one under which complaints based upon information contained in discovery materials produced in a legal proceeding are barred; whether that material had actually been made available to the public at large was held to be immaterial.

A suit by a private person who relies upon information disclosed to him by a government employee in the course of an "audit, or investigation," would also be barred, whether or not the information has been disclosed to the public at large. The fact that the information derives from the government and has been disclosed pursuant to that "audit, or investigation," as those terms are broadly defined, is sufficient to bar a complaint based on that information. If a private person cannot use information that he obtained from a government employee for a qui tam suit because the information was "disclosed" from the government within the meaning of section 3730(e)(4), the government employee also cannot take that information to file his own personal qui tam suit for his private gain; such a use

also involves a "disclosure." A contrary conclusion would be illogical and contrary to Congress' intent.[8]

While no "public disclosure" occurs when a government employee transmits information to another government employee as a part of their mutual official duties, every government employee has a dual status. When acting in an official capacity the employee is an arm of the government. *See* 28 U.S.C. § 2679(d)(1) (United States is solely responsible for the civil consequences of all acts of employee acting within scope of their federal government employment); 44 Comp. Gen. 312 (1964) (United States government is responsible to pay civil fine imposed upon federal employees for acts he took in the performance of his official duties). As such, the employee's efforts, as well as the information and knowledge he gains by reason of his employment, are the government's property. *See Snepp v. United States*, 444 U.S. 507 (1980) (per curiam); H. Con. Res. 175, 72A Stat. B12, 85th Cong., 2d Sess. (1958) (information obtained in the performance of government duties may not be used for making private profit); Executive Order No. 11222, § 203, § 205 (1965) (federal employees may not use information obtained through their employment or use official information for the purpose of private profit or furthering a private interest); Executive Order No. 12674, § 101(c) (1989) (same); 5 C.F.R. §§ 735.204(a)(2), -.206 (same); 32 C.F.R. § 40.4(b)(2) (Department of Defense personnel may not use government information for personal advantage either during or after government service); 32 C.F.R. § 40.4(c)(7)(1) (government property shall be used only for

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[8] Thus, if government employees could file qui tam suits based upon official information, they would be granted a special status, since they would be the *only* persons who could take government information and appropriate it for their own use to file such suits. There is no evidence either in the statute or the legislative history that Congress intended such a distinction, and in fact, if such a distinction were to have been made, one would expect it to be exactly the opposite: that parasitical suits could be filed by private persons but not by government employees.

official government purposes); *see also* Exec. Order 10096, § 1(a) (1950) (inventions created on government time or using government facilities, equipment, materials, funds, or information, or made in consequence of the inventor's official government duties are the property of the government); 17 U.S.C. § 105 (government employee writings created on official time are not copyrightable by the employee).

So long as the employee uses official information only in his official capacity for the purpose of furthering the government's business, no disclosure occurs because the information had never left the government. When he leaves work each day, however, the employee reverts to his status as a private member of the public. Outside of his official capacity, as the district court held (A.11), his acts are his alone and are not attributable to the government. This distinction between an individual in his government-employee capacity and in his private capacity is hardly novel; courts routinely make this distinction under, for example, the Federal Tort Claims Act, 28 U.S.C. § 2671 (definition of "employee of the government"), *see Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986), and under the Federal Employees Compensation Act, 5 U.S.C. § 8102 (compensation for injuries "sustained while in the performance of his duty"), *see Wallace v. United States*, 669 F.2d 947, 952-54 (4th Cir. 1982).

When the government employee uses government information to file his own personal qui tam suit, he acts not within his official capacity, but as a private person with respect to that information. Under these circumstances, the information has been "disclosed" to a member of the "public" because the government employee *qua* relator is acting in his private capacity; as the district court correctly held, he has in essence appropriated government information or property for his own use, A.11, no less than if he took a government vehicle home and used it for purely personal enjoyment.

The plain language of the statute thus supports the district court's decision. Even if, contrary to fact, the statute

were ambiguous, the legislative history contains no evidence that Congress intended to permit suits based upon information obtained in the course of government employment. The legislative history shows, on the contrary, Congress' distaste for parasitical suits, of which government employee suits are the epitome, since Congress expressly rejected a proposal that would have removed the permanent bar on parasitical suits. On two separate occasions, the Senate rejected a proposed "six month" rule that would have allowed qui tam suits based upon disclosure of government information to be filed if six months had passed from the time of the disclosure and the government had not filed suit in that time. Instead, it retained the permanent bar.[9] *See Houck*, 881 F.2d at 504. Thus, contrary to the suggestion of amicus curiae National Treasury Employees Union, the legislative history to the 1986 amendments not only does not support parasitical suits, it actively rejects them.

NTEU points to one paragraph of the voluminous legislative history in support of its claim that this history "fully supports" the conclusion that Congress "contemplated government-employee suits under the Act." NTEU Brief at 14. The cited legislative history, however, consists of a "background statement" reprinted in the Senate Report setting forth the need for additional fraud enforcement tools. S. Rep. No. 345,

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[9] *See* S. 1562 (original proposed 31 U.S.C. § 3730(e)(4), *reprinted in* S. Rep. No. 345, *supra*, at 43; *see id.* at 30, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5295); Amendment No. 2701 (proposed 31 U.S.C. § 3730(e)(5)), *reprinted in* 132 Cong. Rec. S11238, 11240 (daily ed. August 11, 1986); statement of Senator Grassley, *id.* at S11244 (Senate substitution of language permanently barring persons from bringing a qui tam action based solely on public information); H.R. 4827 (proposed 31 U.S.C. § 3730(b)(5)), *reprinted in* H.R. Rep. No. 660, 99th Cong., 2d Sess. 2-3 (1986), and 132 Cong. Rec. H6474-75 (daily ed. September 9, 1986) (House substitute jurisdictional bar containing six month bar); Amendment No. 3214 (proposed 31 U.S.C. § 3730(e)(4)); *reprinted in* 132 Cong. Rec. S15059, 15060 (daily ed. October 3, 1986) (Senate restoration of permanent bar on "public disclosure" suits, rejecting the "six month" rule a second time).

supra, at 4, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5269-70. In detailing the evidence that fraud against the government has become rampant, the Report includes a summary of a survey of federal government employees conducted by the Merit Systems Protection Board in which large numbers of federal employees stated that they knew of fraud or abuse but did not report it because, *inter alia*, they did not believe that the fraud would be investigated or prosecuted. *Id.* at 5, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5270. The Report states that Congress has agreed that the government's fraud investigation and prosecution tools are inadequate, and goes on to explain that the 1986 amendments will give the government additional tools to make fraud investigations more effective, including new authority to issue civil investigative demands and the repeal of restrictive court decisions. *Id.* at 6-7, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5271-72.

Contrary to NTEU's argument, nowhere in the Senate Report is there any statement or even any implication that Congress had made a determination that the appropriate remedy for the nonreporting of fraud by government employees, as set forth in the report of the Merit Systems Protection Board, should be a repeal of the 1943 bar on federal government employee suits. The Senate Report instead states that the purpose of the 1986 amendments to the qui tam provisions is to encourage additional "assistance from the *private citizenry*" to the government in prosecuting False Claims Act suits, and is designed to provide a more "effective vehicle for *private individuals* to disclose fraud." *Id.* at 8, 14, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5273, 5279 (emphasis added). Like the Senate Report, the parallel House Report states that the sole purpose of the 1986 amendments is to create additional incentives to "encourage *private individuals* who are aware of fraud" to file suit. H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986) (emphasis added). The House Report expressly reaffirms the "validity of the reasons for enactment of the 1943 amendments," *id.* at 22, and neither the House nor

Senate Report states or even implies that Congress had determined that federal government employees should be permitted to file False Claims Act suits.

The basic reason that Congress changed the qui tam statutory language in 1986 was to repeal overly "restrictive court interpretations" of the qui tam statute,[10] which had prohibited not only suits by private citizens based on information obtained by the government, but also suits brought by those who had independent information about fraud that the government also happened to possess,[11] including those who had independently obtained the information and given it to the government in the first place and then found themselves barred by that very submission.[12] Congress believed that legislative repeal of these adverse decisions would bolster the Attorney General's fraud enforcement efforts, and it made the statutory changes for this reason. The legislative history thus makes clear that the purpose of the qui tam amendments was to allow "assistance from the private citizenry [that] can make a significant impact on bolstering the Government's fraud enforcement effort." *See* S. Rep. 345, *supra* at 8, *reprinted in* 1986 U.S. Code Cong. & Ad. News at 5273.

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[10] *See* S. Rep. No. 345, *supra* at 4, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5269.

[11] *See* S. Rep. No. 345, *supra* at 29, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5294; *United States ex rel. Vance v. Westinghouse Elec. Corp.*, 363 F. Supp. 1038, 1042 (W.D. Pa. 1973).

[12] *See, e.g., Pettis ex rel. United States v. Morrison-Knudsen Co. Inc.*, 577 F.2d 668 (9th Cir. 1978). The bar on "original source" suits had created an especially perverse incentive: it was to the advantage of persons who had information about fraud to keep it to themselves, because providing it to the government would bar them from subsequently filing a qui tam suit. *See Safir v. Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). This squirreling away of information adversely affected orderly law enforcement by denying the government information that its citizens would normally have freely provided.

Mr. LeBlanc suggests that the Court should ignore this history and should find on the contrary that Congress' only goal was to expand the class of qui tam relators, whatever the effect of the resulting lawsuits upon fraud enforcement. Since his interpretation of the statute to permit government employees to sue would expand the class of private relators, he argues that it should be deemed to further congressional intent. Mr. LeBlanc ignores the purpose of the qui tam expansion, and ignores the fact that suits based solely on information obtained from the government would undermine law enforcement efforts in direct contravention of Congress' expressed intent.

* * *

CONCLUSION

For his complaint, Mr. LeBlanc has relied solely on information he obtained during his employment as a federal employee. The district court therefore correctly dismissed the action for lack of jurisdiction, because it is based upon a "public disclosure" of government information for which Mr. LeBlanc was not the "original source." 31 U.S.C. § 3730(e)(4). The decision should be affirmed.

Respectfully submitted,

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* * *

APPENDIX B

No. 89-3973

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.* ARTHUR P. WILLIAMS,
Plaintiff,

ARTHUR P. WILLIAMS,
Plaintiff-Appellant,

v.

NEC CORPORATION, *et al.*,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

STUART M. GERSON
Assistant Attorney General
ROBERT W. GENZMAN
United States Attorney
MICHAEL F. HERTZ
JOAN E. HARTMAN
Attorneys, Civil Division
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* * *

SUMMARY OF ARGUMENT

The purpose of the informer's provision of the False Claims Act has always been to "protect the Treasury" by creating a monetary incentive for private citizens with independent knowledge of fraud against the government to come forward with the information. The diversion of a part of the government's recovery to the informer is deemed acceptable in such circumstances because without the monetary incentive, the information would never have come to light and the government would not have recovered at all. In 1943, Congress specifically addressed and barred this type of diversion to individuals who bring no new information to the lawsuit but who simply plagiarize information already in the possession of the government.

In amendments to the False Claims Act proposed in 1986, the original draft bill would have allowed these types of parasitical suits where six months had elapsed from the date that information had been publicly disclosed from within the government to the public at large, and the government had not yet acted on the information even if the relator brought no new information to the lawsuit. The Congress as a whole rejected this proposal, however, and it was not enacted. The jurisdictional bar contained in the 1986 amendments, however, continues to refer to actions based upon "public disclosures" of information from within the government, and bars any informer's suit that is based on such a disclosure.

The only substantive change intended by Congress in the amendments was to make it easier for genuine informers bringing new information to the government to file suit. This change was effected by rejecting case law that had prohibited informer's suits where information was in the possession of the government only because the informer had developed the information outside of the government and had provided it to the United States prior to filing suit. Under the amendments, a lawsuit brought by a government employee based upon information that he learned or developed within the scope of

his government employment continues to be barred, as the only Circuit Court to consider this issue has held. *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990).

Appellant argues that by using the "public disclosure" language, Congress prohibited only informer's suits based on information that has been disclosed from within the government to the public at large. By implication, appellant argues, Congress actively intended to permit such suits as long as the information is still confidential and has only been disclosed officially to government employees in the scope of their employment, or has been disclosed by a government employee to his friends or cohorts. This result is irrational and has no foundation in the statute, its history, or the extensive 1986 legislative materials.

Allowing government employees to bring lawsuits based on still confidential government investigations would lead to races to the courthouse by government employees who have access to government investigative materials and would subvert the Attorney General's anti-fraud program. An informer's suit on the facts of this case would undermine the purpose of the False Claims Act by diverting a percentage of the government's recovery to an informer where the government was pursuing its own investigation of the information at the time Mr. Williams' suit was filed and, absent his suit, would have obtained any recovery entirely on its own initiative.

By using the "public disclosure" language, Congress intended to bar all uses of government information to file informer's suits. It did so by describing the normal routes of information flow from within the government to the public at large, and barring informer's suits based on that information. Congress did not specifically address use of still confidential government information because it never occurred to anyone that a government employee or his confidante could make use of such information to file an informer's suit. In any event, by appropriating "official use only" information to file his private

suit, Mr. Williams is making use of government information that he has appropriated for his private use as a member of the public; this use qualifies as a "public disclosure" within the meaning of the statute.

ARGUMENT

I. THIS ACTION IS BARRED UNDER 31 U.S.C. § 3730(e)(4)(A)

A. In 1943 Congress Specifically Addressed And Barred Informer's Suits Based On Government Information

The False Claims Act was enacted in 1863,[6] substantially amended in 1943, and then amended again in 1986. The purpose of the statute has always been to "protect the Treasury" by giving the federal government tools to redress fraud, and by encouraging private individuals with independent knowledge of fraud to come forward and enjoy an informer's reward of a percentage of the government's recovery, and the statute should be interpreted in light of this goal. *United States v. Griswold*, 24 F. 361, 366 (D. Ore. 1885).

In 1943, the Supreme Court concluded that the language of the 1863 statute did not specifically prohibit plaintiffs who had no independent information of a fraud against the government from filing informer's suits, and that plaintiffs could simply copy government indictments into a

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[6] Act of March 2, 1863, ch. 67, 12 Stat. 696, *codified at* Rev. Stat. §§ 3490-3494, 5438 (1874). The statute created civil and criminal remedies against war contractors who had defrauded the government during the Civil War by, for example, furnishing shells filled with sawdust rather than explosive powder. 62 Cong. Globe 955, 37th Cong., 3d Sess. (1863) (Statement of Senator Howard). The civil remedy included double the damages sustained by the government by reason of a false claim together with a $2,000 forfeiture. Section 4 of the statute created an informer's provision, which allowed "any person" to bring a False Claims Act suit, and, under section 6, if such person prosecuted the case to final judgment he would be entitled to one-half the damages and forfeitures recovered.

civil complaint and recover an informer's award. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943).[7] In dissent, Justice Jackson condemned both the Court's literalism and dicta in the majority opinion that under the 1863 statute government attorneys could sue as informers, stating that to permit law-enforcement officials to "use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one." For "[i]f we were to add motives of personal avarice to other prompters of official zeal, the time might come when the scandals of law-enforcement would exceed the scandals of its violation." *Id.* at 560. In another observation especially relevant to this case, Justice Jackson pointed out that a parasitical suit brought by an informer based upon government information while a government investigation is under way will prematurely disclose the information in the possession of the government to the defendant and will greatly prejudice the government's case. *Id.* at 561.[8]

Congress acted immediately and decisively after *Hess* to amend the statutory language to emphasize that the purpose of the False Claims Act is to "protect the Treasury," that parasitical suits based upon information already known to the government do not protect the Treasury, they deplete it, and that parasitical suits are prohibited under the Act. Congress

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[7] Two months after the Hess decision, 18 of 19 pending *qui tam* suits were parasitical actions based on information obtained from indictments, 89 Cong. Rec. 7571, 78th Cong., 1st Sess. (1943). Within six months the number had risen to 28, *id.* at 7437, and within a year the number of parasitical suits had risen to 250. *Id.* at 10845-46.

[8] *See also United States v. Baker-Lockwood Mfg. Co.*, 138 F.2d 48, 53 (8th Cir. 1943) ("Diligence in the enforcement of the false claims statute requires of the Department of Justice the careful and orderly investigation and preparation of the action to be brought, in order that the Government may be able, when the suit is filed, to prosecute it with fairness to the defendants charged as well as to the public."), *vacated on other grounds*, 321 U.S. 744 (1944).

reiterated that the purpose of the False Claims Act informer's provision is to reward only "genuine informers," *i.e.*, those who bring independent information to the lawsuit. S. Rep. No. 291, 78th Cong., 1st Sess. 1, 2 (May 24, 1943); 89 Cong. Rec. 7608, 78th Cong., 1st Sess. (1943) (Statement of Senate Manager Van Nuys) (only "honest informer" should receive reward, not "racketeers"). Congressmen uniformly expressed their dismay that the False Claims Act had been interpreted to permit a private individual "having no scintilla of" independently derived evidence to obtain an informer's reward based solely on the parasitical use of government information. 88 Cong. Rec. 9138, 77th Cong., 2d Sess. (1942) (Statement of Sen. Van Nuys, Senate Sponsor of 1943 amendment).[9]

In particular, Congress was concerned that *Hess* created an incentive "for dishonest and unscrupulous investigators to turn over information to their friends or coconspirators for the purpose of bringing suit against our citizens on information * * * which comes to them in their official capacity as a representative of the United States." 89 Cong. Rec. 10846, 78th Cong., 1st Sess. (1943) (Statement of House Manager Rep. Walter). House Manager Hancock similar pointed out that, under *Hess*, "[t]he temptation and the opportunity is tremendous under the present law for renegotiators, contracting officers of the various purchasing agencies of the Government, and agents for collectors of internal revenue to take advantage of the information they discover in the course of the[ir] [government] business to enrich themselves by instigating informer's suits. That is a temptation we wish to remove." 89 Cong. Rec. 10849.[10]

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[9] The Manager of the House bill termed the Court majority's reasoning "tortuous." 89 Cong. Rec. 10846, 78th Cong., 1st Sess. (1943).

[10] Congress pointed out that even if the 1863 statute could be interpreted to permit suits based upon information in the possession of the government, such a provision would have been justified only because the government had no investigative resources in 1863: the Attorney General had no staff,

Reflecting the concerns set forth above, the Senate and House bills permitted only those informer's suits that were "based upon information, evidence, and sources original with" the informer, and the bills took away federal court jurisdiction over any suit based, *inter alia*, upon information, "obtained by the United States in the course of any investigation." S. Rep. No. 291, *supra* at 1-2 (1943); 89 Cong. Rec. 10744, 78th Cong., 1st Sess. (1943) (House bill). The conference bill that was enacted into law, Pub. L. No. 213, ch. 377, 57 Stat. 608 (Dec. 23, 1943),[11] edited and shortened this language, 89 Cong. Rec. 10745, but incorporated its essence: that informer's suits based upon information and evidence obtained by the United States in the course of an investigation are considered "parasitical actions" that are not permitted under the Act. *United States v. Rippetoe*, 178 F.2d 735, 736 (4th Cir. 1949); *United States ex rel. Davis v. Long's Drugs*, 411 U.S. 1144, 1152 (S.D. Calif. 1976) (apparent that purpose of 1943 amendment is to bar "parasitical suit"); *United States*

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there were no federal agency investigators, and the Federal Bureau of Investigation did not exist. S. Rep. No. 291, *supra* at 2; 89 Cong. Rec. 7608, 78th Cong., 1st Sess. (1943) (Statement of Senate Sponsor Van Nuys); *id.* at 10845 (Statement of House Manager Walter); *see United States ex rel. Bayarsky v. Brooks*, 154 F.2d 344, 345 (3d Cir.), *cert. denied*, 329 U.S. 716 (1946).

[11] The 1943 amendments to the informer's provision were originally codified at 31 U.S.C. § 232(C) (1976), which provided that the district courts have no subject matter jurisdiction over an informer's suit that is "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." In 1982, the amendment was recodified with a minor updating of its language at 31 U.S.C. § 3730(b)(4) (1982), which provided that the courts have no subject matter jurisdiction if "the action is based on evidence or information the Government had when the action was brought." The 1943 amendments also gave the government a right for the first time to intervene in the informer's action and to exclude the relator from participation; in such an event, the informer's share of the recovery—50% under the 1863 law—would be reduced to 10%. In the event that the United States did not intervene, the relator's share was cut from 50% to 25%.

ex rel. Weiss v. Schwartz, 546 F. Supp. 422, 424 (N.D. Calif. 1982) (same).

B. Section 3730(e)(4)(A) Continues In Effect The 1943 Bar Upon Informer's Suits Based Upon Information Developed By The Government

In 1986, Congress changed the language of the parasitical suit jurisdictional bar for one reason: to create a greater incentive for informers with *new* information to bring that information to the attention of the government. This goal was achieved in part through the overrule of case law that had outlawed an important category of *non*parasitical suits: the Courts of Appeal had uniformly held that a private informer would be barred from suit under the 1943 amendments where the information in the possession of the government was not the result of any effort by salaried government employees but had in fact been given to the government in advance of suit by the private informer.[12]

In 1986 Congress changed the language of the jurisdictional bar in order to eliminate this restriction upon genuine informers.[13] Nowhere in the extensive legislative

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[12] *Safir v. Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *United States v. Aster*, 275 F.2d 281, 283 (3d Cir.), *cert. denied*, 364 U.S. 894 (1960); *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984); *Pettis ex rel. United States v. Morrison-Knudson Co.*, 577 F.2d 668, 669 (9th Cir. 1978); *see United States ex rel. Lapin v. IBM*, 490 F. Supp. 244, 247 (D. Haw. 1980) (same); *see also United States ex rel. MacFarlane v. Hutchinson*, 519 F. Supp. 563, 564 (D. Col. 1981) (fact that informer brought additional relevant information to government's attention after suit was filed did not entitle him to informer's reward where original suit was based on information in the possession of the government).

[13] The goal of encouraging genuine informers—those in the possession of new information not known to the government—to come forward was also achieved by increasing the informer's share of recovery, 31 U.S.C. § 3730(d)(1) & (2); allowing the informer a continuing role in a

history to the 1986 amendments does Congress state that it intended to make *any* change to the underlying parasitical suit bar that it had addressed in great detail in 1943. *See United States v. Ryans*, 284 U.S. 167, 173, 175 (1931) (new statutory codification should not be interpreted as incorporating a radical change from a prior codification without any indication that this change was intended).[14]

The 1986 version of the jurisdictional bar, 31 U.S.C. § 3730(e)(4)(A), overrules adverse case law restricting genuine informers and continues the existing bar on parasitical suits by providing as follows: "No court shall have jurisdiction over an [informer's] action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media."

This language was intended to address all normal routes of information flow from within the government to the private sector, and to preclude private individuals from plagiarizing the types of government information that would normally be available to them to file an informer's suit. While allowing a private person to inform the government about fraud without cutting off his *qui tam* rights, Section 3730(e)(4)(A), as the section-by-section analysis contained in the House Report makes clear, continues generally to preclude any action that is based on "*information already available to the Government*." H.R. Rep. No. 660, 99th Cong., 2d Sess. 30 (June 26, 1986). *See United States ex rel. Dick v. Long Island Lighting Co.*, 710 F. Supp. 1485, 1486 (E.D.N.Y. 1989) ("Information already known to the government may not be the basis for a

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False Claims Act lawsuit once the government had taken over its prosecution, *id.* § 3730(c); and allowing the informer to recover his attorney's fees, *id.* § 3730(d)(2).

[14] *See also United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (Court looks to history in interpreting False Claims Act language).

successful qui tam action."), *aff'd*, 912 F.2d 13 (2d Cir. 1990). The section-by-section analysis does not distinguish between information in the possession of the government that has been released to the public at large, and government information that has been obtained in another manner. The information upon which this case was based was not only developed by the government, but also the government had an open investigation of the facts alleged in the complaint at the time the suit was brought. Under the statutory language and the section-by-section analysis, this action is barred because it is based solely upon information developed by and available to the government.

In 1986, Congress did not incorporate into the statute specific language addressing the parasitical use of *non*public government information because it did not need to; government investigations and investigatory files are immune from disclosure under various governmental privileges, and Congress never entertained the idea that private individuals could circumvent the section 3730(e) bar on parasitical use of information developed by the government simply by obtaining confidential government investigatory materials from their friends in public service, let alone that public employees could themselves use this information. Such actions are included within the bar on uses of publicly disclosed government information.

Appellant asks this Court to adopt an interpretation of section 3730(e)(4) that would prohibit only suits based on a narrowly defined set of disclosures of government information and that would allow suits based on disclosures of such information from a government employee to himself or from a government employee to his friends or cohorts as long as that information had not yet been made available to the general public. Such a distinction is irrational, would encourage the trafficking in confidential government investigatory materials, would lead to premature disclosure of government investigations and evidence to targets of criminal and civil

investigations, and would encourage dereliction of duty by government employees.

The facts of this case are a good illustration of the concrete harm to the public interest that would result from the interpretation of the False Claims Act that appellant urges this Court to adopt. Mr. Williams is a government attorney who fulfilled his official duties as a contract law attorney admirably by analyzing contracts awarded over a period of ten years by a U.S. contracting office in Japan, and by bringing to his superiors' attention the fact that the bidding patterns on the contracts were consistent with bidrigging on the contracts. Once he had developed this information, Mr. Williams' responsibility was to refer the facts that he had gathered to the government units—the Air Force Office of Special Investigations, the Department of Defense Inspector General, or the Department of Justice—that are given the mandate by Congress to investigate and prosecute such cases. Lured by the incentive of a possible recovery of up to 30% of the government's damages under the False Claims Act, 31 U.S.C. § 3730(d)(2), however—in a case where the asserted single damages are in the tens of millions of dollars—Mr. Williams engaged in a series of actions that were not in the best interest of the government. He disclosed his official report, containing both "official use only" bid information and confidential government investigatory material, to a third party source as a reward, and the third party then disclosed it to one of the targets of the investigation. He allowed the unit within his agency charged with conducting investigations of these types of allegations a mere several weeks to investigate a case prior to filing his own for-profit suit—this, in a complex case that the government has now spent almost two years investigating—in the process of apparently tipping off the defendant to the government's investigation by releasing sealed and confidential documents to an industry publication.

There is absolutely no indication in the statute or legislative history that Congress intended to establish these sorts of perverse incentives for government employees when it

amended the False Claims Act in 1986, and in fact the legislative history shows that Congress had the opposite intent, to preclude *any* parasitical suits based upon information developed by the government.

The original House and Senate bills would have permitted a "very limited" category of suits based upon information in the possession of the government to go forward where the information had been in the possession of the government for six months, but the government had failed to act. S. Rep. No. 345, 99th Cong., 2d Sess. 16 (July 28, 1986), *reprinted in* 1986 U.S. Code Cong. & Ad. News 5266, 5281; S. 1562, *see* Subcomm. on Admin. Prac. & Proc., Senate Comm. on the Judiciary, *False Claims Reform Act: Hearing on S. 1562*, S. Hrg. No. 452, 99th Cong., 1st Sess. 7 (Sept. 17, 1985); H.R. 4827, 99th Cong., 2d Sess. at 6 (May 15, 1986). The conference committee ultimately concluded, however, that this provision was unworkable and unwarranted, and the provision was dropped. 132 Cong. Rec. 29322 (Oct. 7, 1986).[15] As one court has summarized, the Act actually enacted into law thus "eliminated the provisions [in the early House and Senate bills] which were intended to allow citizens without direct information of the fraud to prompt the Government to act on information already in its possession as proposed in the original Senate bill." The 1986 amendments as ultimately enacted, therefore, *"continued to bar the same type of 'parasitical suits' based on publicly disclosed information which were the concern of Congress in 1943." United States*

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[15] The legislative history to the informer's provision must therefore be read with caution, because both the House and Senate reports to the 1986 amendments are based upon bills which incorporated the provision allowing parasitical suits after six months. S. Rep. No. 345, *supra* at 28, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5266, 5293; H.R. Rep. No. 660, *supra* at 5, 42-43. In fact, the cases primarily relied upon by appellant in this case—*Erickson v. American Institute of Biological Sciences*, 716 F. Supp. 908 (E.D. Va. 1989), and *United States v. CAC-Ramsey, Inc.*, 744 F. Supp. 1158 (S.D. Fla. 1990) rely heavily upon legislative history to the draft provisions that were *dropped* from the bill enacted into law.

ex rel. LaValley v. First Nat'l Bank of Boston, 707 F. Supp. 1351, 1356 (D. Mass. 1988) (emphasis added); *see United States ex rel. Stinson v. Provident Life Ins. Co.*, 736 F. Supp. 614, 617 (D.N.J. 1990) (appeal pending).

Appellant's argument contra is premised in its entirety upon its constricted interpretation of the word "public" in section 3730(e)(4); appellant contends that by outlawing suits based upon only "public" disclosures, Congress demonstrated that it wanted to change existing law to bar *only* suits based on specific types of "public" disclosures of government information, and to *allow* suits based on any other type of disclosure of government information. The legislative history as well as the language of section 3730(d)(1)[16] demonstrate, however, that Congress referred to "public" disclosures in its broadest sense and was concerned principally with the use of government information.[17] Moreover, the reason that the

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[16] The term "public" contained in section 3730(e)(4) is not a term of art, and therefore "takes color from its surroundings." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 545 (1940).

[17] The original House and Senate drafts of section 3730(e)(4) did not include the word "public" but referred solely to information "which the Government disclosed" as the type of information upon which an informer's suit could not be based. *See* S. 1562, *reprinted in* S. Hrg. No. 452, *supra* at 6; *id.* as reported on July 28, 1986, *see* S. Rep. No. 345, *supra* at 30 (July 28, 1986), *reprinted in* 1986 U.S. Code Cong. & Ad. News 5266, 5295; H.R. 4827, § 3730(b)(5) (May 15, 1986); *id.* as amended June 26, 1986. Originally, draft sections 3730(d)(1) and (e)(4) were parallel provisions: 3730(e)(4) outlawed suits based entirely on government disclosures, and 3730(d)(1) allowed suits based in part on government disclosures but reduced the informer's share to 10% of the recovery in such cases. Neither provision limited those disclosures of government information covered by the two sections solely to "public" disclosures. It was not until an amendment (No. 2701) introduced by Senator Grassley in the nature of a substitute bill on August 11, 1986, that the word "public" first appears to describe the types of disclosures upon which an informer's suit could not be based under 3730(e)(4); however, the parallel 3730(d)(1) was not changed, indicating that the drafters of the substitute (e)(4) did not believe that they had changed the substance of the original draft bill and that they attached no

jurisdictional bar focused in the first instance upon "disclosures" rather than "information" is that the bill as originally drafted would have permitted the informer to bring a parasitical suit based on information already in the possession of the government once six months had elapsed from the date of "disclosure" of that information and the government had taken no action. Once that proposal was rejected, the original "disclosure" language or the substitute "public disclosure" language as the time from which to measure the six-month period no longer became as significant. To be sure, Congress still wanted to bar suits based on public disclosures, as one form of non-permitted parasitical suit, but that in and of itself provides no support for appellant's argument that in 1986 Congress intended, for the first time, to permit informer's suits based upon information obtained from the government in other manners and that the government is actively pursuing through its own investigative processes.

In any event, Mr. Williams' suit is indeed based upon a "public disclosure" of information in a government "investigation," within the language of section 3730(e)(4). While no "public disclosure" occurs when a government employee transmits information to another government employee as a part of their mutual official duties, every government employee has a dual status. When acting in an official capacity the employee is an arm of the government, *see* 28 U.S.C. § 2679(d)(1) (acts of employee acting within scope of federal employment are attributable to United States government); 44 Comp. Gen. 312 (1964) (same), and as such, the employee's efforts, as well as the information and

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particular significance to the word "public." 132 Cong. Rec. 20531, 99th Cong., 2d Sess. (Aug. 11, 1986). In the discussion of the conference reconciliation, which adopted the Senate language, there is no discussion of the term "public," nor is there any indication that Congress was aware that 3730(d)(1) (still referring to all "disclosures") and 3730(e)(4) (now referring to "public" disclosures) were no longer parallel under the substitute bill. 132 Cong. Rec. 28570, 28580 (Oct. 3, 1986); 132 Cong. Rec. 29315, 29321 (Oct. 7, 1986).

knowledge that he gains by reason of his employment, are the government's property. *See Snepp v. United States*, 444 U.S. 507 (1980) (per curiam); H. Con. Res. 175, 72A Stat. B12, 85th Cong., 2d Sess. (1958) (information obtained in performance of government duties belongs to the government); Exec. Order No. 11222, §§ 203, 205 (1965), *reprinted in* 3 C.F.R. 306 (1964-65 Comp.); Exec. Order No. 12674, § 101(c) (1989), *codified at* 5 U.S.C. § 7301 note; 5 C.F.R. §§ 735.204(a)(2), -2.06; 32 C.F.R. §§ 40.4(b)(2), -(c)(7)(1) (all same); *Restatement (Second) of Agency* §§ 387, 388, 404 (1958). As long as the employee uses official information only in his official capacity for the purpose of furthering the government's business, no disclosure occurs because the information has never left the government.

In contrast, when the employee seeks to use government information outside the scope of his employment, the employee reverts to a status as a private member of the public.[18] When he seeks to use government information to file his own personal informer's suit, he acts not within his official capacity, but as a private person with respect to that information. Under these circumstances, the information has been "disclosed" to a member of the "public" within the meaning of 31 U.S.C. § 3730(e)(4) because the government employee *qua* informer is acting in his private capacity. He has in essence appropriated government information or property for his own use, no less than if he took a government vehicle home and used it for purely personal enjoyment.[19]

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[18] This distinction between a government employee in his public versus his private capacity is hardly novel; courts routinely make this distinction under, for example the Federal Tort Claims Act, 28 U.S.C. § 2671, *see Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986), and under the Federal Employees Compensation Act, 5 U.S.C. § 8102, *see Wallace v. United States*, 669 F.2d 947, 952-54 (4th Cir. 1982).

[19] Here, the information is encompassed in a government "investigation" within the language of § 3730(e)(4)(A). Mr. Williams was Chief of the Contract Law Section at the Yokota Base and his job responsibilities included investigating and reporting any contract fraud of which he because aware. His current use of information that he obtained in the course of his investigation is thus a use barred by § 3730(e)(4)(A).

Thus, even under the constricted interpretation of section 3730(e)(4) urged upon this Court by appellant, Mr. Williams' suit would be barred.

In his fight against fraud, the Attorney General must rely on large numbers of investigators, auditors, attorneys, and other government personnel. If these employees could file informer's complaint for their own private profit based upon information that they develop during the course of a government investigation, the incentive would be nearly overwhelming, as it was for Mr. Williams, to file suit before the government investigation is complete and referred to the Attorney General for prosecution. The Attorney General would face the prospect of races to the courthouse to file suits based upon facts that are only in a preliminary stage of investigation, with corresponding disclosure to the potential defendant of the existence of the inquiry and undermining of the government's case. The skewed incentives created by such a rule would wreak havoc upon the Attorney General's anti-fraud program, and would have an adverse effect upon personnel management within the government.

Without even any *hint* in the extensive legislative history that Congress intended to encourage such trafficking in government information, or to create an incentive for salaried government employees who have the duty to investigate and prosecute fraud against the government in consideration of that salary, to receive additional amounts for doing their government job through a False Claims Act informer's suit, appellant's interpretation should be rejected.[20] The language

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[20] It is a cardinal principle of statutory interpretation that statutes should not be applied in a manner that will lead to absurd results, and "the reason of the law" should "prevail over its letter" where the letter would lead to

of the statute should be interpreted in light of the purpose of the informer's provision, which is to provide an incentive for original sources of information to come forward with new information not in the possession of the government.[21] Mr. Williams did not need the incentive of an informer's reward to come forward with his suit; he was required as a condition of his employment to provide the information he developed in the course of his employment to his employer, the United States government.[22] The government was itself pursuing the information at the time Mr. Williams filed his suit, and allowing a recovery to Mr. Williams in these circumstances would deplete the Treasury by diverting part of a recovery that

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plainly unintended consequences. *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1869); *St. Vincent's Hospital v. King*, 901 F.2d 1068, 1071 (11th Cir. 1990). "[E]ven when the plain meaning d[oes] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' th[e] Court has followed that purpose, rather that the literal words." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

[21] The Supreme Court has recognized that in interpreting the language of the False Claims Act, the Court should be guided by the "evident legislative purpose in enacting the law." *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Similarly, the courts of appeals have stated that, in interpreting the Act, the "fundamental task" is "to give effect to the intent of Congress." *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990) (inserting limiting language into § 3730(e)(4)(B) that furthers the purpose of the Act).

[22] *See* Exec. Order No. 12674, § 101(k) (Apr. 12, 1989), *reprinted after* 5 U.S.C. § 7301 note ("all executive branch employees" have a duty to "disclose waste, fraud, abuse, and corruption to appropriate authorities"); H. Con. Res. 175, 72A Stat. B12, 85th Cong., 2d Sess. (1958) (information obtained in performance of government duties belongs to the government); Exec. Order No. 11222, §§ 203, 205 (1965), *reprinted in* 3 C.F.R. 306 (1964-65 Comp.); Exec. Order No. 12674, § 101(c) (1989), *codified at* 5 U.S.C. § 7301 note; *Restatement (Second) Of Agency* § 381 (1958) (agent must give principal information "relevant to affairs entrusted to him" and that "the principal would desire to have").

is designed to make the government whole, and that the government would have obtained on its own initiative, to an informer who brought nothing obtained outside the scope of his government employment to the lawsuit.

* * *

CONCLUSION

For all of the above reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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